IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ~~77~~ 77-490

WILLIAM G. BARTER, WANDA B. BARTER,
RALPH D. BLAIR and PAULINE D. BLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AUTHORITIES

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The petitioners, William G. Barter, Wanda B. Barter, Ralph D. Blair and Pauline D. Blair, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 31, 1977, affirming *per curiam* the judgment of the United States District Court for the Northern District of Indiana, Fort Wayne Division.

OPINIONS BELOW

The opinion of the District Court is reported at 422 F. Supp. 958 (1976) and appears in the Appendix, *infra*, pp. 29-59. The opinion of the Court of Appeals, as yet unreported, appears in the Appendix, *infra*, pp. 61-63. The opinion of the District Court, with certain exceptions, was adopted as the opinion of the Court of Appeals.

JURISDICTION

The *per curiam* opinion of the Court of Appeals was entered on May 31, 1977. A petition for rehearing, timely filed, was denied on July 11, 1977 (App., *infra*, p. 65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

Do the provisions of Section 1 of the Internal Revenue Code which impose higher tax rates on the taxable income of a married person, whose spouse has significant income, than on the same taxable income of an unmarried person, violate the Due Process Clause of the Fifth Amendment, the Free Exercise Clause of the First Amendment, and the fundamental right to associate in marriage protected by the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution?

2.

Assuming, as the Court of Appeals and District Court did, that the excess taxes that petitioners were compelled to pay were a constitutionally significant burden (App., *infra*, p. 54) on petitioners' fundamental right to associate in marriage (App., *infra*, p. 50) and to freely exercise their religious beliefs in regard to marriage (App., *infra*, p. 59).

a. Is there nevertheless "a compelling governmental interest" in treating the married couple as the unit of aggregation for the imposition of progressively higher tax rates?

b. Does the complexity of the Internal Revenue Code reduce the burden which the government would otherwise bear of demonstrating that there is no other less burdensome means of serving the governmental interest?

3.

Assuming, as the Court of Appeals and District Court found, that petitioners do not have a greater ability to pay taxes than do unmarried persons with the same respective taxable incomes (App., *infra*, p. 53), and that it is thus irrational for Congress to impose higher tax rates on petitioners' taxable incomes than on the same respective taxable incomes of unmarried persons, has the Sixteenth Amendment nevertheless repealed the requirements of logical consistency imposed on Congress by the Fifth Amendment in a case where the amount of tax is small?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves § 1 of the Internal Revenue Code, 26 U.S.C. § 1, as amended by the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, § 803, and is reprinted verbatim in the Appendix, *infra*, pp. 67-70.

The pertinent parts of the United States Constitution are Art. 1, § 8(1) and § 9(4), Amendments 1, 3, 4, 5, 9, 10, 14 § 1 and 16, appearing in the Appendix, *infra*, pp. 73-74.

STATEMENT OF THE CASE

This is an action by petitioners, married wage earners, for a refund of that part of their 1971 federal income taxes

which exceeds the amount of taxes that would have been due had each petitioner been unmarried on December 31, 1971. The action was brought in the District Court pursuant to 28 U.S.C. § 1346. The facts are not disputed.

Mr. and Mrs. Barter, husband and wife, filed a joint 1971 U.S. Individual Income Tax Return reporting a combined taxable income of $20,488.49, upon which they paid $4,536.32 in taxes, using IRC § 1(a) rates. The marginal rate on their combined income was 32%; $12,771.73 of the taxable income was attributable to the separate earnings and income of Mr. Barter, employed as a railroad man, and $7,716.76 was attributable to the separate earnings and income of Mrs. Barter, employed as a school teacher. Had each been allowed to use § 1(c) unmarried rates, their respective marginal rates would have been 29% and 24% and their combined taxes would have been $160.50 less. It is this amount for which they claim refund. (Record-25-Barter Affidavit, App. p. 14; Record-1-Complaint.)

Mr. and Mrs. Blair likewise were husband and wife, separately employed as wage earners, who filed a joint return for 1971. They reported a combined taxable income of $25,147.09, upon which they paid $6,072.95 in taxes using § 1(a) rates. The marginal rate on their combined incomes was 36%; $16,539.32 of the taxable income was attributable to the separate earnings and income of Mr. Blair, and $7,962.45 of which was attributable to the separate earnings and income of Mrs. Blair. Had each been allowed to use § 1(c) unmarried rates, their respective marginal rates would have been 34% and 24% and their combined taxes would have been $479.58 less. It is this amount for which they claim refund. (Record-25-Blair Affidavit, App. p. 24; Record-1-Complaint.)

The Barters are members of the United Methodist Church. The Blairs, although not members, have from time to time attended services of that denomination. Each have sincere religious beliefs in the teachings of the United Methodist Church in regard to marriage. The

teachings of that Church assert that holy matrimony is an honorable estate, instituted by God; the teachings assert the "sanctity of marriage" and recognize that it is "blessed by God"; the Service of Marriage is an Order of the Church. (Record-25-Thomas Affidavit, App. pp. 17-24.)

Taxpayers were married for the entire year of 1971 and were residents of Indiana, a non-community property state, which by statute and case law has abrogated the common law disabilities of married women.

Changes in Internal Revenue Code § 1

The Tax Reform Act of 1969 amended § 1 of the Internal Revenue Code, effective for taxable years beginning after December 31, 1970. (App., *infra*, pp. 67-70.) Section 1 as amended provides for four separate rate schedules applying progressively higher tax rates on graduated brackets of income. Sec. 1(a) imposes tax rates on the combined taxable incomes of a married couple (and on the separate income of certain surviving spouses) who elect to file a joint return under IRC § 6013. These rates are identical to the rates previously imposed on joint marital income prior to the amendment, by virtue of an income splitting formula, although usually expressed by an identical schedule which was adopted administratively.

Sec. 1(d) imposes tax rates on the separate taxable income of every married individual who does not make a single return jointly. These rates are identical to the regular rate schedule previously applicable to all individuals, whether married or unmarried, who did not qualify as heads of household.

The income brackets under § 1(d) are one-half as wide as the brackets under § 1(a), otherwise the rates of § 1(d) are identical to the rates of § 1(a).

Sec. 1(c) is a new schedule. It imposes tax rates on the separate taxable income of every unmarried individual

(except unmarried individuals qualifying as head of household or as surviving spouses). In the income brackets from 0 to $4,000.00 and from $44,000.00 to $100,000.00 the marginal tax rates are identical under § 1(c) and under § 1(d). In the income brackets from $4,000.00 to $44,000.00, the marginal tax rates are *lower* under § 1(c) than under § 1(d); the income brackets under § 1(c) are one-half as wide as the brackets under § 1(a).

Sec. 1(b) imposes tax rates on the separate taxable income of every unmarried person who qualifies as a head of household (or a married head of household who does not live with his spouse, § 143). The marginal tax rates under § 1(b) are lower at all levels than the marginal rates under § 1(c) and are lower than the previous rates applicable to heads of households.

Two changes were made to IRC § 1 by the Tax Reform Act of 1969 which are pertinent to these cases:

1. A new schedule § 1(c) was adopted which contains lower rates in comparison with the previous regular rates applicable to all individuals.

2. The new lower schedule § 1(c) can be used only by unmarried individuals; married individuals must use § 1(d) which contains the previous regular rates; or, if filing jointly, married individuals must include the incomes of both and must use § 1(a) which contains rates equivalent to the previous regular rates as had been administratively adjusted for income splitting. [1]

Resulting Tax Disadvantage to Two-Earner Married Couples

These changes in § 1 have produced the following effects:

[1] The cases at bar test the tax rate disadvantage of § 1(a) to § 1(c), i.e., two married individuals in comparison with two unmarried individuals; *Johnson v. U.S.*, consolidated with the cases at bar in the District Court, but not yet determined, tests the tax rate disadvantage of § 1(d) to § 1(b), i.e., one married individual in comparison with one unmarried individual.

1. There is a tax rate advantage to the married person filing a joint return, whose spouse has no taxable income, in comparison with one unmarried person. That advantage decreases as the taxable income of the spouse increases, so that the advantage disappears when each spouse contributes a significant portion of the combined taxable marital incomes. The percentage which is "significant" depends on the level of the combined incomes, but is generally 20% or more of the combined incomes.

2. There is a tax rate disadvantage to the married person filing a joint return, whose spouse has significant income, in comparison with one unmarried person, and there is a tax rate disadvantage to the married couple filing a joint return, where each of the spouses has significant income, in comparison with two unmarried persons. The resulting tax disadvantage occurs at all levels of taxable income over $4,000.00. As an absolute dollar amount, the resulting tax disadvantage is greater for middle and upper income taxpayers than for low income taxpayers. It is greater when the marital income split is 40%-60% to 50%-50%, but it is not inconsiderable at 70%-30%. A married couple cannot avoid the tax rate disadvantage by filing separate married returns since the marginal rates using § 1(d) are always as high or higher than when using § 1(a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT.

A.

Novelty of the Federal Question

Never before in history has Congress required that higher income tax rates be imposed on the taxable incomes of a married couple than on the same respective taxable incomes of two unmarried individuals. Petitioners, two-earner married couples, have attacked this tax rate disadvantage imposed by the Tax Reform Act of 1969 in the first tax year — 1971 — in which that disadvantage became effective, and petitioners have timely moved at every step to secure this judicial determination.

The District Court opinion, adopted by the Court of Appeals, recognizes the novelty of the questions presented: ". . . no case brought to the attention of this court has flatly stated that marriage is a fundamental right in the context of a constitutional challenge to the Internal Revenue Code." (App., *infra,* p. 49).

Although the court below assumes that the excess taxes paid by petitioners constitute a significant burden on their fundamental constitutional right to marry (App., *infra,* p. 50, p. 54) and on their right to freely exercise their religious beliefs in regard to marriage, it nevertheless holds that this burden is justified by "a compelling governmental interest" (App., *infra,* pp. 54-55). The "compelling governmental interest" found by the court below is as follows:

> 1. Individuals with equal ability to pay taxes should pay equal taxes. Therefore it is legitimate for Congress to reduce the tax rates for the unmarried individual in order to more nearly equate with the tax rates for the married individual whose spouse has no income (one unmarried individual vs. the one-income married couple which benefited from income splitting under the Revenue Act of 1948).
>
> 2. Married couples with the same aggregate incomes should pay the same taxes, regardless of income distribution between the spouses. Therefore there is a compelling necessity for Congress to treat all married couples as taxable units, depriving married individuals within the marital units of the reduced tax rates applicable to unmarried individuals (the two-income married couple vs. two unmarried individuals).

No economic authority is cited for the proposition that all married couples should pay the same taxes regardless of the income distribution between the spouses. Almost all economic authorities agree that the one-earner couple has greater tax-paying ability than the two-earner couple, inasmuch as the homemaker in the one-earner couple makes a very real economic contribution which is untaxed.

No case of this Court, nor of any other court, has been cited for the proposition that the above interest, or similar interests, constitute a compelling governmental interest sufficient to justify burdens on fundamental individual constitutional rights. The instant litigation is thus a case of first impression in the conflict between the power of Congress to tax and the right of the individual to religious and familial and associational freedoms.

B.

Importance of the Federal Question

Settlement of the issues herein raised are in the public interest inasmuch as petitioners' cases are representative of the relative tax burdens now suffered by many two-earner married couples. At one time in our nation's history the one-earner married couple was the rule and the two-earner married couple was the exception. The entry of increasing numbers of married women into the labor force, however, has resulted in an increasing percentage of marriages of the two-earner variety. In the

years between 1947 and 1973 the percentage of employed married women, spouse present, has increased from 20% to 42.2%, *Statistics on Manpower*, a Reprint from the 1974 Manpower Report of the President, U.S. Dept. of Labor, pp. 287 and 289. Presently, nearly 50% of all American families have two working spouses.

An income tax rate disadvantage to the two-earner married couple in relation to two unmarried earners has the following effect: It acts as an economic incentive for the two-earner married couple to divorce. It acts as an economic incentive to the two-earner unwed couple to stay unwed. Such a penalty on marriage cannot help but have profound effects upon the institution of marriage itself and upon our civilization which traditionally has viewed marriage as upholding the highest interests of society.

> ". . . Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."
> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."
> *Loving v. Commonwealth of Virginia*, 338 U.S. 1, 12 (1967)

> "The marriage relation is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interest of society and is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state . . . ."
> *Sweigart v. State*, 213 Ind. 157, 165, 12 N.E.2d 134 (1938)

> "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage."
> *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (1952) (Traynor, J.)

This Court has most recently repeated the importance it attaches to familial associations:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."
> *Moore v. City of East Cleveland, Ohio*, 97 S.Ct. 1932 (1977)

This Court has frequently provided constitutional protection for many of the incidental activities associated with the marriage relationship and the long-term commitment of family members to each other: establishing a home, rearing and educating children, privacy in the marital bedroom, securing information on contraceptives, bearing a child, not bearing a child, maintaining parental relationships, *Maynard v. Hill*, 125 U.S. 190 (1888), *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925),

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), *Prince v. Massachusetts,* 321 U.S. 158, 166 (1948), *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972), *Stanley v. Illinois,* 405 U.S. 645 (1972), *Roe v. Wade,* 410 U.S. 113, 152-153 (1973), *Cleveland Board of Education v. LeFleur,* 414 U.S. 632, 639 (1974); See: *Turner v. Dept. of Employment Security,* 96 S.Ct. 249 (1975), *Kelley v. Johnson,* 96 S.Ct. 1440, 1444 (1976), *Paul v. Davis,* 96 S.Ct. 1155, 1166 (1976).

Marriage has not been cherished solely because of its long secular tradition. The practice of monogamous marriage is a precept of most religions. Matrimony is a sacrament of the Roman Catholic Church and the Greek Orthodox Church. Marriage in Judaism is Kiddushin, or sanctification. Marriage is a holy covenant in the United Methodist Church. Marriage is a holy estate, ordained by God, in the Lutheran Church. Numerous scriptural passages from the Holy Bible support beliefs that marriage is honorable and joyous, that marriage was created by God for the first parents, and that the relationship of husband and wife is like unto the relationship between Christ and the Church, including:

Genesis 1:26-31	Luke 16:18
Genesis 2:18-25	John 2:1-11
Exodus 20:14	Ephesians 5:21-23
Matthew 19:4-6	Hebrews 13:4

Most religions recognize that the laws of the state concerning marriage must be complied with. And the state likewise acknowledges the religious nature of marriage by authorizing clergymen to solemnize marriage ceremonies.

Petitioners, and others who have sincere religious beliefs in the teachings of their church, suffer exceptional conscientious agony when they are forced to choose between the precepts of their religion and forfeiting tax benefits, on one hand, and abandoning the precepts of their religion in order to secure tax benefits, on the other hand.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

A.

The decision below conflicts with Hoeper v. Tax Commission which strikes down mandatory higher state income tax rates on marital incomes.

Hoeper v. Tax Commission, 284 U.S. 206 (1931) involved a challenge under the due process and equal protection clauses of the Fourteenth Amendment to the tax system of the State of Wisconsin. This Court struck down the Wisconsin law because mandatory aggregation of spousal income combined with a single progressive tax schedule resulted in *higher* rates on marital income, and there was no rational reason to support higher taxes on the marriage status. Under the Internal Revenue Code, as amended by the Tax Reform Act of 1969, the *higher* rates on marital income result from mandatory use by married persons of rate schedules 1(a) or 1(d) which contain higher rates than the rate schedules 1(b) or 1(c), which can be used by unmarried persons.

The identical rate differentials can be expressed for married and unmarried persons whether by mandatory aggregation of spousal income coupled with a single progressive schedule or by mandatory use of different and higher rate schedules for married persons than for unmarried persons. In either case, the higher rates on marital income are mandatory whenever each spouse has significant income. In either case, the type of return filed affects only division of liability, which is not in question in *Hoeper* or in the cases at bar.

The holding in *Hoeper* was not limited to striking down the attribution of one spouse's income to the other. Mr.

Hoeper only claimed a refund for the *excess* tax he was assessed over and above the tax each spouse would have owed had each been unmarried. Mr. Hoeper's second assignment of error complained of the higher tax rates imposed on *his own income* because his wife also had income. (Record 33-App. pp. 3-4) The State of Wisconsin in its brief before this Court argued that Mr. and Mrs. Hoeper could each be taxed at higher rates on their respective incomes because each had less financial burden to bear since they lived in the same household. (Record-33-App. p. 54) This Court rejected this argument, however, 284 U.S. at 217 (as did the court below in the cases at bar) (App., *infra*, p. 53).

It is implicit that one person can not be forced to pay the tax on another person's income, but this Court, in the following language, also determined that the attempt to tax one person's income at a rate of tax fixed with reference to the sum of the income of another (and thus a higher rate of tax) was equally unconstitutional:

"Since then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law *to measure his tax*, not by his own income but, *in part*, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U.S. 41, 77, 44 L.ed. 969, 984, 20 S.Ct. 747, is apposite.

"'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to *measure the tax* on one person's property or income *by reference to* the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact *the taxpayer's* income cannot be made such by calling it income." (284 U.S. at 215) (emphasis added)

The Supreme Court then stated the evil it found in the Wisconsin tax scheme to be the *higher* tax which resulted:

"What Wisconsin has done is to tax as a joint income that which under its law is owned separately and *thus to secure a higher tax than would be the sum of the taxes on the separate incomes.*" (284 U.S. at page 216) (emphasis added)

This is the identical evil which is produced by § 1 and of which taxpayers now complain.

The court below, (App., *infra*, pp. 43-44) attempts to distinguish *Hoeper* from the instant litigation because under the Wisconsin Act the tax was computed on the aggregated marital income, while under the IRC the tax is computed on aggregated marital income only if a single joint return is filed using rate schedule § 1(a), which taxpayers could have avoided had each filed separate married returns, using the less advantageous rate schedule § 1(d). This reasoning of the court below would be valid only if petitioners were attempting to attack a § 1(a) classification in relation to a § 1(d) classification.[2] However, petitioners are attempting to attack the § 1(a) classification in relation to a § 1(c) classification.[3] The

[2]The two-earner married couple filing a joint return vs. each spouse filing separate returns.

[3]The two-earner married couple filing a joint return vs. two unmarried persons with the same respective taxable incomes but who can use the more advantageous § 1(c) rates.

"option" to file a separate return under the IRC does not present a factual distinction at all, since Mr. and Mrs. Hoeper also had an option to, and did in fact, each file separate returns.

The District Court's attempted distinction must be analyzed in regard to two effects: first, the allocation of tax liability between the marital partners and, second, the differential in the applicable rates of tax to marital income and nonmarital income. There is in fact no difference between the Wisconsin Act and the IRC in regard to either effect, much less a "crucial difference."

Allocation of Tax Liability

The filing of a single joint return results in joint liability, whether under the Wisconsin Act or under the IRC. The filing of separate returns results in divided liability under the one or under the other. The *Hoeper* decision did not in any way find the filing of a joint return vs. separate returns to be important, 284 U.S. at 212, 213, fn. 1.

The Differential in Applicable Tax Rates to Marital Income and Nonmarital Income

Under the Wisconsin Act, *higher* marginal tax rates and thus *higher* taxes were applicable to marital income than to nonmarital income. These higher marginal tax rates resulted from the compulsory application of a single progressive tax rate schedule to aggregate spousal incomes.

Under the IRC, *higher* marginal tax rates and thus *higher* taxes are applicable to marital income (whenever each spouse has significant income) than to nonmarital income; these higher marginal tax rates result from the compulsory use of different tax schedules for married persons, whether joint or separate, which different tax schedules always contain higher marginal

tax rates. Higher taxes for married persons are no less onerous under the IRC because the higher tax rates result from compulsory use of a special tax schedule which contains higher rates than the rates for unmarried individuals.

This Court Has Rejected All Justifications for the Imposition of Higher Tax Rates on Marital Income

Prevention of Fraud or Evasion

The court below suggests that prohibiting married individuals from using the lower unmarried rates is necessary to prevent married persons from "arranging their affairs" so as to avoid or lower their taxes (App., *infra*, p. 56). This Court rejected the prevention of fraud or evasion as a justification for imposing higher tax rates on marital income in *Hoeper*, 284 U.S. 206 at 217. And more recently this Court has held that the desire to prevent fraud does not provide a rational basis to justify a discriminatory classification, *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). As to petitioners and all other wage earners, there is no possibility of "arranging their affairs" since taxpayer efforts to transfer earned income have never been successful, *Lucas v. Earl*, 281 U.S. 111 (1930).

Marriage Unit as a Taxable Entity

The court below (App., *infra*, p. 54) justifies the higher tax on marital income on the grounds that the "marriage unit" is a "legitimate taxable entity." This Court in *Hoeper*, 284 U.S. at 214-15 found the husband and wife to each be *sui juris* and thus not an appropriate unit for the purpose of imposing progressively higher tax rates.

To reimpose the common law fiction that husband and wife are legally one, and that one the husband, is unrealistic and ignores the legal position of women today. *Taylor v. Louisiana*, 419 U.S. 522 (1975), *Stanton v. Stanton*, 421 U.S. 7 (1975). In various contexts this Court

has recognized that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972), *Planned Parenthood of Central Missouri v. Danforth,* 96 S.Ct. 2831, 2841 (1976). The married woman is entitled to the same economic benefits from her labor as is the married man, *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), *Frontiero v. Richardson,* 441 U.S. 677 (1973). The married woman worker is entitled to the same social security protection for her surviving spouse as is a married man worker, *Califano v. Goldfarb,* 97 S.Ct. 1021 (1977). Each marital spouse is an independent, autonomous person, for the purpose of engaging in conspiracy, *U.S. v. Dege,* 364 U.S. 51 (1960). Individual rights within the family structure have been increasingly recognized, not only for the wife whose legal existence was restricted at common law, but also for the father, *Stanley v. Illinois,* 405 U.S. 645 (1972) and for the child, *Matter of Gault,* 387 U.S. 1 (1967), *Tinker v. Des Moines Independent Com. Sch. Dist.,* 393 U.S. 503 (1969). See also: *Application of Gaulkin,* 351 A.2d 740, 744 (1976) (N.J. S.Ct.), *Re Opinion of the Justices,* 22 N.E. 2d 49 (1939) (Mass.), *Nye v. U.S.,* 407 F.Supp. 1345 (1975) (M.D. N.Car.), *Benjamin v. Cleburne Truck & Body Sales, Inc.,* 424 F.Supp. 1294 (1976) (V.I.).

To say that the married couple is a "taxable entity" which can only be compared with another marital "taxable entity" and not to unmarried individuals with the same taxable incomes is to deprive married persons of their individual liberties under the Bill of Rights. It is to say that the liberties of a group must be protected vis-a-vis another group, but that the liberties of individuals within that group are immaterial. This is a shocking and novel concept that has never been adopted by this Court. This Court has instead been a bulwark for the protection of individual liberties. "The very essence of civil liberty consists in the right of every individual to claim the

protection of the laws, whenever he receives an injury," *Marbury v. Madison,* 1 Cranch 137, 163 (1803). "It is the individual, we said, who is entitled to the equal protection of the laws — not merely a group of individuals, or a body of persons according to their numbers," *Mitchell v. U.S.,* 313 U.S. 80, 97 (1940).

This Court considered the constitutionality of treating "groups" equally in *Loving v. Virginia,* 388 U.S. 1 (1967), at 7 to 10. It had been argued that the miscegenation laws did not violate the Equal Protection Clause because members of each race in an interracial marriage were punished to the same degree, but the Court held that mere "equal application" to racial groups is not enough to avoid the judicial review of the invidious racial discrimination. See *Perez v. Lippold,* 198 P. 2d 17, 20 (Cal.) (1948), (Traynor, J.); *McLaughlin v. Florida,* 379 U.S. 184, 188-191 (1964). In *Carrington v. Rash,* 380 U.S. 89, 91-3 (1965) it was argued that a Texas law prohibiting servicemen from acquiring a voting residence in the state could not be attacked since all members of the military were treated equally; nevertheless this Court held that the military v. non-military classification was subject to judicial inquiry.

Ability to Pay

Although ability to pay is ordinarily the accepted justification for discriminatory tax classifications, the court below does not support the imposition of higher tax rates on the two-income married couple in comparison with two unmarried individuals on any finding that the married couple has greater ability to pay. The court below rejected the government's "ability to pay" argument (App., *infra,* p. 53), finding instead that the tax rate schedules impose on certain married persons a greater tax burden on the sole basis that they are married. The court below specifically finds that the petitioners have paid more taxes than single persons with the same ability to pay.

The State of Wisconsin in its brief before this Court in *Hoeper v. Tax Commission* argued that a married couple could be taxed at higher rates because each had less financial burden to bear since they lived in the same household. This Court, likewise, rejected this argument, 284 U.S. at 217.

Viability of Hoeper

All of the subsequent cases which distinguish *Hoeper* have involved an attempt by the taxpayer to *split* with another the income which taxpayer had once owned or earned and over which he still retained some control in order to benefit from lower tax rates. The holding of *Hoeper* that higher rates may not be imposed on marital income has never been questioned by this Court. The decision of the court below does not attack or undermine the rationale of *Hoeper*.

Deference to the Legislature

The court below suggests that *Hoeper* may no longer be viable because the dissenter's views on "substantive due process" ultimately prevailed in the mid-thirties (App., *infra,* p. 43, fn. 23). This suggestion conflicts with the most recently pronounced views of this Court that judicial deference to the legislature is inappropriate when freedom of personal choice in matters of marriage and family life is at stake, *Moore v. City of East Cleveland, Ohio,* 97 S.Ct. 1932, 1937-8 (1977):

> "Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen to be Members of

> this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary — the boundary of the nuclear family.
>
> "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and), solid recognition of the basic values that underlie our society' .... Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."

B.

The decision below conflicts with prior decisions of this Court which strike down classifications which are based upon archaic and overbroad assumptions concerning role-typing

The Tax Reform Act of 1969 was based on the assumption that each married couple had only one earner. No consideration was given to the two-earner couple which does not benefit from income splitting nor to the working spouse who had no tax advantage vis-a-vis the unmarried person.

The tax disadvantage to the unmarried person, arising from the 1948 income splitting device, resulted from a comparison between one unmarried person and the one-income married couple. Miss Shinder, the chief witness at the 1969 Hearings, complained that "all benefits are based on the wife depending upon the worker for support; no thought has ever been given to the single woman who depends upon herself for her own support." *Hearings*

Before the Comm. on Ways and Means, H.R., 91st Cong., 1st Sess., 1969, p. 1977. She did not complain about the excess tax she paid in relation to the total taxes paid by the two-income married couple, nor did she complain about the tax she paid in relation to the tax paid on the same income by a working wife.

Congress did not have the two-income couple in mind when it adopted the Tax Reform Act of 1969. No fiscal information was ever considered on the cost of allowing married taxpayers to continue using the same schedules as unmarried taxpayers as they always had been able to do before, *Hearings Before Comm. on Ways and Means,* 91st Cong., 1st Sess., Part 12, pp. 5624-5625.

It was assumed that all married couples benefited from income splitting. For example:

> "As a result of income splitting, married couples pay lower taxes than single people at the same levels." *H. Rep. of the Comm. on Ways and Means,* House, to accompany H.R. 13270, 91st Cong., 1st Sess., 1969, p. 210.

> "The tax burden on single persons is disproportionately high in relation to that of married persons who enjoy the benefits of income splitting." Sec. Cohen, *Hearings Before the Comm. on Finance,* U.S. Sen., 91st Cong., 1st Sess., p. 556.

> "As a result of income splitting, married couples pay lower taxes than single people at the same income levels." *S. Rep. No. 91-552,* 91st Cong., 1st Sess., 1969, p. 260.

> "This action is needed because present law imposes harsh tax burdens on single people compared to married people who receive the benefits of the so-called split-income provision." Sen. Russell B. Long, Chairman of the Sen. Comm. on Finance, *Opening Floor Debate on H.R. 13270,* Nov. 24, 1969, 115 Cong. Rec. S 14944.

> "But in conference we accepted the Senate's provision which says that the single individual, regardless of his age, shall not pay more than 120 percent of what the married couple pays under the split-income provision." Rep. Wilbur Mills, Chairman of Ways and Means Comm., *Floor Debate on H.R. 13270,* Dec. 22, 1969, 115 Cong. Record H 40866.

As the above quotations indicate, the whole import of the legislative history is based on the assumption that every married couple pays lower taxes than an unmarried person at the same income level as a result of income splitting. This assumption was valid only for the one-income couple. It was not valid for the two-income couple. The husband and wife with equal incomes did not benefit from income splitting. The total taxes they paid was the same as the total taxes any two unmarried persons paid with the same respective incomes. The total taxes they paid was less than the tax paid by one unmarried person who had the same total income as the husband and wife's combined incomes, but that excess was a result of a single progressive income tax schedule, not income splitting.

In post-passage remarks attempting to justify the tax rate disadvantage Secretary Cohen confirmed that no attention had been given to the married couple in which the wife as well as the husband produced taxable income.

> "There can be no question that the present system does not provide perfect results in every instance, but the inequities generally arise from what seem to be *atypical living conditions,* for example where two single people live together or because of a *particular division of income between husband and wife."* (Emphasis added) *Hearings before the Comm. on Ways and Means of the House on the Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working,* 92d Cong., 2d Sess., 1972, p. 78.

> "Beyond that, I happen to feel, Mr. Chairman, that the husband and wife represent a partnership, and that they have comon (sic) interests, *and the wife is I think in our basic American tradition devoted to her husband's success and efforts* and that we really ought not to try to distinguish between the income of one and the income of the other, but treat them as a marital unit, each trying to achieve the same goals." (Emphasis added) Id. at 85.

This Court has struck down Congressional classifications based on just such assumptions, that wives are usually dependent on their husbands, while husbands are rarely dependent on their wives, and just such "archaic and overbroad" generalizations; such assumptions being more consistent with the role-typing society has long imposed than with contemporary reality, *Califano v. Goldfarb*, 97 S.Ct. 1021 (1977).

C.

The decision below conflicts with prior decisions of this Court which strike down burdens based on status.

The court below found that the tax rate schedules impose on certain married persons, including petitioners, a greater tax burden on the sole basis that they are married (App., *infra*, p. 53).

This Court has held that burdens may not be constitutionally imposed on a person merely because of the status of that person's relatives, *Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), or because of the status of persons with whom he or she lives, *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Lewis v. Martin*, 397 U.S. 552, 559 (1970); Cf. *Van Lare v. Hurley*, 421 U.S. 338 (1975).

D.

The decision below conflicts with prior decisions of this Court which impose the highest standard of judicial scrutiny when tax burdens are imposed on the exercise of fundamental constitutional rights.

The District Court finds that the inherently complex nature of legislative decisions in the field of taxation reduces the burden of justification which the Government must bear to support tax burdens imposed on the exercise of fundamental constitutional rights (App., *infra*, pp. 49, 50 and 56).

This Court, however, has consistently imposed the highest standards of scrutiny to state tax schemes which impose even slight burdens on fundamental constitutional rights. *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975), *Bullock v. Carter*, 405 U.S. 134, 144 (1972), *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966), *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105, 112-115 (1943), *Grosjean v. American Press Co.*, 297 U.S. 233 (1935).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Civil No. F 74-111, F 74-112, F 74-113

SARAH G. JOHNSON, et al

Plaintiffs,

V.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF DECISION AND ORDER

In these three consolidated cases plaintiffs seek refunds of income taxes paid for the year 1971 on the ground that the rate schedules of the Internal Revenue Code, 26 U.S.C. § 1, unconstitutionally discriminate against them as married persons. The cases are now before the court on plaintiffs' and defendant's cross motions for summary judgment. For reasons which are set forth hereinafter, plaintiffs' motion for summary judgment will be denied. Defendant's motion for summary judgment will be granted in the Barter and Blair cases but denied in the Johnson case.

I.

With the exception hereinafter noted in the Johnson case, the material facts which give rise to these causes of action are not in dispute. Plaintiff in F 74-111, Sarah G. Johnson, filed an individual income tax return for the

year 1971, showing a taxable income of $38,486.19, upon which she paid a tax of $12,913.52, computed at the rate applicable to married persons filing separately, IRC § 1(d). During 1971, all of her taxable income was a result of her separate earnings and income. Throughout that entire year she maintained as her home a household which was the principal place of abode of her three unmarried minor children. She bore all of the cost of maintaining this household and furnished the sole support of her three children by her marriage to their deceased father. In 1971, she remarried, lived with her husband, and remained married to him on December 31, 1971.[1]

On January 23, 1973, Ms. Johnson filed a claim for a refund of $2,816.82, the difference between the taxes she paid based on the "married filing separately" rate schedule and the amount she would have paid had she been entitled to file as an "unmarried head of household."[2] The tax rates for individuals who meet the statutory requirements of "unmarried head of household" are set forth in § 1(b) and are lower than those imposed by § 1(d).

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[1]This remarriage subsequently ended in divorce on June 26, 1972.

[2]26 U.S.C. § 2 (b) provides (emphasis supplied):

Definition of Head of Household.—

(1) *In general.*—For purposes of this subtitle, an individual shall be considered a head of household *if, such individual is not married at the close of his taxable year,* is not a surviving spouse (as defined in subsection (a)), and either—

(A) maintains as his home a household which constitutes for such taxable year the principal place of abode, as a member of such household, of—

(i) a son, stepson, daughter, or stepdaughter of the taxpayer, or a descendant of a son or daughter of the taxpayer, but if such son, stepson, daughter, stepdaughter, or descendant is married at the close of the taxpayer's taxable year, only if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(ii) any other person who is a dependent of the taxpayer if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

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fn. 2 continued

(B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151.

for purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

Subsection (c) of § 2 further provides:

(c) *Certain Married Individuals Living Apart.*—For purposes of this part, an individual who, under section 143(b), is not to be considered as married shall not be considered as married.

For purposes of determining an individual's marital status, section 143 of the Code provides:

(a) *General Rule.*—For purposes of this part—

(1) The determination of whether an individual is married shall be made as of the close of his taxable year; except that if his spouse dies during his taxable year such determination shall be made as of the time of such death; and

(2) An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

(b) *Certain Married Individuals Living Apart.*—For purposes of this part, if—

(1) an individual who is married (within the meaning of subsection (a)) and who files a separate return maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a dependent (A) who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the individual, and (B) with respect to whom such individual is entitled to a deduction for the taxable year under section 151,

(2) such individual furnishes over half of the cost of maintaining such household during the taxable year, and

The Internal Revenue Service denied Ms. Johnson's refund claim and she thereafter timely instituted this action pursuant to 28 U.S.C. § 1346.

Plaintiffs in F 74-112 and F 74-113 are married couples who filed joint returns with taxes computed at the rates provided in § 1(a) for married persons filing jointly.

The Barters, plaintiffs in F 74-112, reported a combined taxable income of $20,488.49, of which $12,771.73 was the separate earnings and income of William Barter and $7,716.76 which was attributable to the earnings and income of his wife, Wanda Barter. The Barters paid $4,536.32 in tax on this income, of which they claimed a refund of $160.50 on December 12, 1972. This sum represented the difference in the amount they paid and that which they would have paid had each been allowed to use the rate schedule for single persons, § 1(c).

Plaintiffs in F 74-113 are Ralph and Pauline Blair. Their 1971 joint return showed a taxable income of $25,147.09, on which a tax of $6,072.95 was paid. Mr. Blair's separate earnings and income were $16,539.32 and those of Mrs. Blair were $7,962.45. A refund claim for $479.58 was filed by the Blairs on February 2, 1973. This sum likewise represented the difference between the tax actually paid and that which would have been due if each had been entitled to utilize the unmarried rate schedule of § 1(c).

The Internal Revenue Service denied the refund claims of both couples, and they subsequently instituted timely

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fn. 2 continued

(3) during the entire taxable year such individual's spouse is not a member of such household,

such individual shall not be considered as married.

The cumulative effect of these provisions was to preclude Ms. Johnson from filing as an unmarried head of household, since on December 31, 1971, she was married to and living with her then husband and had lived with him during 1971.

actions under 28 U.S.C. § 1346 in this court. All plaintiffs profess sincere beliefs in the teachings on marriage of the religious denominations with which they are affiliated.[3] Plaintiffs are all residents of Indiana, which is a non-community property state, and which by statute and case law has abrogated the common law disabilities of married women.[4]

II.

Specifically, plaintiffs attack sections 1 and 143[5] of the Internal Revenue Code, as amended by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487. They assert that the rate schedules of section 1, based as they are upon the marital status of the taxpayer, are unconstitutional as applied to them. Their attack is wide-ranging, encompassing provisions of the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. They contend that:

1) The due process clause of the Fifth Amendment forbids tax rate differentiation by which the tax

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[3]Sarah Johnson is a member of the Lutheran Church in America, which teaches that "marriage is ordained by God as a structure of the created order." *Social Statements of the Lutheran Church in America, Sex, Marriage and Family* (adopted by the Fifth Biennial Convention of the Lutheran Church in America at Minneapolis, Minnesota, June 25-July 2, 1970). The Barters are members of the United Methodist Church, and the Blairs, although not members, have from time to time attended services of that denomination since their marriage and believe in its teachings in regard to marriage. Those teachings assert the "sanctity of marriage" and recognize that it is "blessed by God." *Social Principles of the United Methodist Church* (adopted by the 1972 General Conference of the Church at Atlanta, Georgia).

[4]*See, e.g.*, Married Womens Act, [1923] Indiana Acts, Ch. 63, p. 190, *codified in* Ind. Code § 31-1-9-1 *et seq.*; Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969) (establishing wife's right to sue for loss of husband's consortium).

[5]For the text of § 143, *see supra* note 2.

on the income of one spouse is measured in part by the income of the other spouse.

2) The due process clause of the Fifth Amendment forbids gender-based tax rate differentiation that results in a greater burden on married female workers than is imposed upon married male workers.

3) The due process clause of the Fifth Amendment forbids marital classification by which higher tax rates are imposed on the taxable income of a married person (whose spouse has significant income) than are imposed on the same taxable income of an unmarried person.

4) The due process clause of the Fifth Amendment forbids classification by which higher tax rates are imposed on the taxable income of a married person who lives with her spouse than are imposed on the taxable income of one who does not.

5) The free exercise clause of the First Amendment prohibits the imposition of higher tax rates on those who practice their religious beliefs in regard to marriage.

6) The "fundamental right to marry," protected by the First, Fourth, Fifth, Ninth and Tenth Amendments is violated by a tax rate differentiation which imposes higher tax rates on the taxable income of a married person (whose spouse has significant income) than on the same taxable income of an unmarried person.[6]

Defendant counters that the tax rate schedules

[6]Plaintiffs also originally alleged that the enforcement of the rate schedules violated their Fifth Amendment right to protection against self-incrimination. In their motion for summary judgment, however, plaintiffs appear to have abandoned this claim.

attacked by plaintiffs do not suffer from any constitutional infirmities and that there exist reasonable bases for the differentials in the rate structures. Defendant also raises the question of the plaintiffs' right to any recovery in these actions. It is this latter question to which the court turns first, mindful of the admonition in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936) (Brandeis, J., concurring), that if non-constitutional grounds exist for a decision dispositive of the litigation, the court should not decide the constitutional issues, even though properly presented.

III.

The Government contends that because they failed to file separate income tax returns for the 1971 tax year by April 15, 1972, the Barters and the Blairs are not entitled to any recovery of taxes in this suit. The Government's argument is that both couples, by way of this suit, seek in effect to revoke their joint returns and utilize the lower rates applicable to single persons. This, the Government asserts, is precluded by Treas. Reg. § 1.6013-1(a)(1) (1973), which requires that if spouses have previously elected to file a joint return and thereafter wish to file separate returns, they must file their separate returns by the last date on which a joint return could be filed.[7] In these instances that date would have been April 15, 1972.[8]

[7]26C.F.R. § 1.6013-1 provides:

(a) *In general.* (1) * * * For any taxable year with respect to which a joint return has been filed, separate returns shall not be made by the spouses after the time for filing the return of either has expired. See, however, paragraph (d)(5) of this section for the right of an executor to file a late separate return for a deceased spouse and thereby disaffirm a timely joint return made by the surviving spouse.

[8]26 U.S.C. § 6072 provides:

(a) *General Rule.*—In the case of returns under section 6012, 6013, 6017 or 6031 (relating to income tax under subtitle A), returns made on the basis of the calendar year shall be filed on or

Assuming the validity of the regulation in question, the court finds that it does not operate as a bar to the Barters' and Blairs' claims. It is obvious that the regulation was not designed or intended to apply in a situation such as this where the taxpayers attack the constitutionality of the rates which by statute are applicable to them.

Moreover, acceptance of the Government's argument would produce the anomalous result that in order to test the constitutionality of the married rate schedules, the Barters and the Blairs would have been required to pay *even more* in taxes than would single persons with equal incomes, since it is apparent that had they filed separate returns as married persons the rates of § 1(d) would have produced a greater tax on their incomes than did the § 1(a) rates which they utilized.

Finally, and perhaps most significantly, if the Government's argument were accepted, the practical effect would be to insulate from attack the rate schedule of § 1(a). If all taxpayers, who wished to challenge the rate differentials between single and married persons were required to file a separate return, presumably none would have the requisite "standing" to challenge the "married filing jointly" rates. This court cannot countenance such a result.

Accordingly, the court finds that the Barters' and Blairs' failure to file separate returns does not operate as a bar to their right to recovery.

On the other hand, the Government argues that since Ms. Johnson and her husband had the option of filing a joint return, which at § 1(a) rates would produce a lower

fn. 8 continued

before the 15th day of April following the close of the calendar year and returns made on the basis of a fiscal year shall be filed on or before the 15th day of the fourth month following the close of the fiscal year, except as otherwise provided in the following subsections of this section.

tax than those in § 1(b) on equivalent levels of income, she should not be heard to complain. The question, therefore, is whether Ms. Johnson's claim is properly presented.

It is unclear from the record why Ms. Johnson could not file a joint return with her then-husband, Robert Taylor.[9] Nor does the record indicate whether Taylor had any income. Despite possible discovery problems,[10] the court will refrain from deciding Ms. Johnson's claim absent proof that she as a practical matter could not have filed a joint return.[11]

By paying taxes at the rate for separate marrieds under § 1(d), the plaintiff may have voluntarily disadvantaged herself solely for the purpose of making this constitutional challenge. In order for Ms. Johnson properly to challenge the statute, she must have a "good-faith pocketbook action." *Doremus v. Board of Ed. of Borough of Hawthorne,* 342 U.S. 429, 434-35 (1952). If the financial

[9]On page 2 of the affidavit of Ms. Johnson, submitted as part of the appendix to plaintiffs' brief in support of their motion for summary judgment, she refers to her response to Interrogatory No. 2 submitted to her by the Government. In her response, filed on March 15, 1975, she answered the Government's question about her failure to file a joint return by stating that she did not know why her husband did not file a joint return and that she had no way of forcing him to do so. She did not state that he refused to file such a return with her.

[10]Since Johnson and her husband filed separate returns, the Government has taken the position that Johnson is not entitled to see her husband's tax return, and has denied her discovery requests aimed at disclosure of that document. It would appear that the Government's position is well founded, since § 7213(a) makes it unlawful for any officer or employee of the United States to disclose the income tax return of anyone, unless authorized by law. Inasmuch as Johnson and her husband each filed separate returns, neither is authorized to examine the other's return. *See* § 6103, and the regulations promulgated thereunder, 26 C.F.R. 301.6103.

[11]While the court could conjecture that her husband refused to file a joint return, on the record it would be unjustified in doing so. It will await the disclosure of further facts and circumstances surrounding the filing of her return.

injury she alleges has been self-inflicted, serious questions exist as to whether she has proper standing to raise her constitutional objections or, more generally, whether this is a feigned case. *Cf. United States v. Johnson*, 319 U.S. 302 (1943); *Lord v. Veazie*, 8 How. 251 (1850). Had she filed a joint return, she would have incurred no injury *vis-a-vis* the head of household rates she now seeks to use and would therefore have no standing to raise her constitutional claims.[12] Both Ms. Johnson's and the Government's motion for summary judgment will therefore be denied. A material issue of fact remains as to whether Ms. Johnson voluntarily incurred a pocketbook injury which might under certain circumstances infer a lack of good faith. It is impossible to make a proper determination of these questions on the present record before the court.

IV.

In order to place in proper focus the Barter and Blair challenges to the current tax rates, it is necessary to review briefly the history of the income tax structure. Until 1948 the rate structure of the Internal Revenue Code did not differentiate between taxpayers on the basis of their marital status. The individual was the taxable entity. Under this arrangement, those married persons who lived in some community property states enjoyed a tax saving over married persons in non-community property jurisdictions, because under the laws of certain community property states, earnings and income were treated as belonging equally to both marital partners regardless of who earned them. Given the progressive rate structure, the inclusion of one half the income in each spouse's return had the effect of substantially reducing the couple's total tax liability relative to couples in non-community property states. The savings were

[12]Of course, had Ms. Johnson filed a joint return, she could have raised the same claims as the Barters and Blairs.

greatest in "one-earner" families, *i.e.*, those where only one spouse earned all or most of the family's income.

This method of "income splitting" was upheld by the Supreme Court of the United States in *Poe v. Seaborn*, 282 U.S. 101 (1930). In *Poe*, the Court held that a wife was taxable on one-half of the community income, which was comprised in that case of the earnings and investment income of the husband. The Court reasoned that the income could be thus split, since under the community property laws of Washington, where the plaintiff husband and wife resided, she had a vested interested in her share of the community income. The Court's decision in *Poe* involved only a construction of the income tax statutes and did not reach the question of the power of Congress to tax income to the spouse who earned it, regardless of the characterization of the other spouse's interest in that income under state law.

Following the decision in *Poe*, the legislature of a number of non-community property states, anxious to reduce the taxes of their residents, enacted community property laws and others indicated their willingness to follow suit. In 1948, Congress responded to this state legislative activity by enacting the first income splitting provisions of the Code.[13] It is clear from the legislative history that the purpose of Congress was to create geographical equality in taxation.[14]

The means chosen was to allow married couples to file joint returns.[15] Although there continued to be only one tax rate schedule, the tax on a married couple's aggregate income was calculated as if each had earned one-half of it. Thus, the applicable tax rate was applied to only one-half of the couple's income and the resulting figure was

[13]Revenue Act of 1948, §§ 301-05, 62 Stat. 110.

[14]*See* H. Rep. No. 1274, 80th Cong., 2d Sess., p. 24 (1948); S. Rep. No. 1013, 80th Cong., 2d Sess., p. 25.

[15]*Id.* § 303.

multiplied by two.[16] Since the tax rates remained progressive, the effect of this income splitting provision was to lower the marginal tax rate applicable to total income. As had been the case in community property states, this change produced the greatest reduction in taxes for those couples in which there was only one income earner. The advantages of the income splitting provisions diminished as the income of one spouse approached that of the other.

In 1951, Congress for the first time created a second rate schedule.[17] This schedule was for use by unmarried taxpayers who maintained a household for certain purposes. The rates applicable to such individuals were set at points approximately halfway between those applicable to single persons and those applied to married persons filing joint returns.

This income splitting system continued in effect until 1969. During those years, the system came under increasing criticism from single persons whose tax on comparable incomes exceeded by as much as 40.9%[18] those of married couples filing joint returns. Criticism of the disproportionate tax burden of single persons relative to married individuals filing jointly prompted Congress in 1969 to adopt new rate schedules with the express purpose of reducing this disparity. In place of the two-rate schedules theretofore in effect, the Tax Reform Act of 1969 established four rate schedules for individuals.[19] Section 1(a) sets forth the rate schedule for married persons who file joint returns and generally provides the lowest marginal rates. Section 1(b) rates apply to the

[16] *Id.* § 301.

[17] Revenue Act of 1951, § 301, 65 Stat. 452.

[18] Summary of H.R. 13270, Tax Reform Act of 1969, as Reported by the Committee on Finance, 91 Cong., 1st Sess., pp. 99, 101-02.

[19] § 803(a), Pub. L. No. 91-172, 83 Stat. 678. The rate schedules are codified at 26 U.S.C. § 1(a)-(d), and became effective for tax years beginning after December 31, 1970.

incomes of those persons who file returns as unmarried heads of household and at most levels of income are somewhat higher than those applicable to married persons filing jointly. The third rate schedule, § 1(c), imposes still higher rates than those imposed by § 1(b) on the income of unmarried non-heads of household and certain married individuals who qualify under § 143. The highest rates are found in § 1(d), which is applied to the incomes of estates, trusts, and married persons who file separate returns.[20]

The structure of the new rate schedules achieved Congress' major aim of reducing the tax burdens on single persons. Thus, at no equivalent level of income does the tax paid by a single person exceed that of a married couple filing jointly by more than 20%.

The reduction in the rates applicable to single persons, besides reducing their tax burden, had another effect, which forms the bases of the Barter and Blair claims. In

[20] The differences in the tax rates imposed by the four schedules are not uniform. Generally, the greatest differences exist at the middle income levels, and the disparity becomes less at either end of the income spectrum. The following chart is partially illustrative of the rate differentials:

Marginal Rate in %

Taxable Income	§ 1(a) married *couple* joint return	§ 1(b) head of household	§ 1(c) single person	§ 1(d) married *individual* separate income
2,000	16	18	19	19
4,000	19	19	21	22
8,000	22	23	25	28
12,000	25	27	29	36
16,000	28	31	34	42
20,000	32	35	38	48
24,000	36	38	40	50
28,000	39	42	43	53
32,000	42	45	50	55

Pechman, *Federal Tax Policy*, App. p. 49 (1971).

certain instances where both spouses have "significant" income ("significant" is generally 20% or more of the couple's total income), married persons pay *more* in tax than would two single persons with the same aggregate income.[21] The Barters and the Blairs contend that they have paid more than they would had they been single and that the additional amounts paid constitute an unconstitutional exaction from them of a "marriage penalty."

V.

In asserting that the tax rate schedules, as applied to them, are violative of the due process clause of the Fifth Amendment, plaintiffs place major reliance on *Hoeper v. Tax Commission*, 284 U.S. 206 (1931). That case involved a challenge, under the due process and equal protection clauses of the Fourteenth Amendment, to the tax system of the State of Wisconsin. Under § 71.05 of the Wisconsin tax statute, each married couple living together was required to combine their incomes and apply to the aggregate total the progressive tax rates which the statute imposed. The total tax so computed was enforceable against the husband or the wife and exceeded that which would have been due had each spouse been allowed to file a separate return and apply the tax rate to his or her own taxable income. Another section of the statute, § 71.09(4)(c), allowed the filing of separate returns, but in the event separate returns were filed, the tax was computed on the same combined total.[22]

[21] "One-earner" families generally still enjoy tax advantages relative to single persons with equal income, since the former group has always benefited most from the income splitting provisions of the prior law, which under the 1969 Act was replaced by a separate rate structure in § 1(a).

[22] The Court noted that while an election under § 71.09(4)(c) to file separate returns would have reduced the amount of tax as compared to that imposed upon joint returns, the total tax would still have exceeded the sum of the husband's and wife's taxes if separately assessed on their individual incomes. 284 U.S. at 213, n.l.

Mr. and Mrs. Hoeper both had income and earnings but did not file a joint return. They elected instead to file separate returns and compute the tax on each marital partner's income individually. An assessment for the difference between the tax paid by the Hoepers individually and that which was computed on their combined income was made against Mr. Hoeper. After protest, Hoeper paid the tax and unsuccessfully sought a refund through the state courts of Wisconsin. On appeal to the Supreme Court of the United States from the Wisconsin Supreme Court's denial of his claim for refund, Hoeper claimed that the Wisconsin tax system effectively attributed to him income of another on which he was then taxed and that such an exaction was arbitrary and discriminatory.

After a careful review of Wisconsin's laws on the status of a married woman's right to property, which provided that a husband had no right to any of his wife's separate earnings and income, the Supreme Court held that since exaction under the Wisconsin statute measured one person's income by reference to that of another it violated principles of due process.

Plaintiffs here contend that *Hoeper* is dispositive of their claims. They argue that the federal tax structure as applied to them suffers from the same constitutional infirmities which characterized the Wisconsin tax system, namely, that it measures for tax purposes the income of one spouse by reference to that of the other. Although they concede that the two systems are not identical, they assert that the federal statute indirectly produces the same result as that achieved directly by the Wisconsin provisions. They argue that §§ 1(a) and 1(d) in effect compel the combining of income of two spouses who live together, since the sum of the taxes computed under § 1(d) is always equal to or greater than the total tax computed under § 1(a). And, they point out, the tax imposed by § 1(a) on the joint income of two spouses who

each have "significant" income is greater than would have been imposed had the spouses been free to select the rates of § 1(b) or § 1(c).

Without pausing to consider whether *Hoeper* would be followed today even on its own particular facts,[23] this court is satisfied that the tax statutes under attack here are distinguishable from those of Wisconsin. Concededly, the Wisconsin revenue law allowed a husband and a wife to file joint or separate income tax returns as does federal law. See 26 U.S.C. § 6013.[24] The crucial difference is that under Wisconsin's statute, regardless of which type of return was selected, the tax was assessed on the couple's aggregate income. The federal law, on the other hand, contains no such compulsory income aggregation provision. If married persons each elect to file separate returns, each may do so, and the tax computed is based *solely upon each taxpayer's own separate income.* It is true that in most instances it is more advantageous for the couple to file a joint return because the rates of § 1(d) applicable to separate return income are generally higher, and at least always equal, to those provided in § 1(a). However, the fact remains that each married taxpayer may make the individual choice to file a separate return and thus avoid "attribution" of his income, if that it be, to the income of his spouse. Any aggregation of the two spouses' income in a joint return is

[23]The decision in *Hoeper* was over the vigorous dissent of Holmes, Brandeis and Stone, J.J., whose views of the due process clause as a restriction on the power of state legislatures, popularly denominated "substantive due process," differed from those in the majority of the Court at the time that *Hoeper* was decided. Their view was subsequently to prevail. *See* Nebbia v. New York, 291 U.S. 502 (1934).

Later, Justice Douglas, joined by Justice Black, questioned the underlying rationale of *Hoeper*. Fernandez v. Wiener, 326 U.S. 340, 365 (1945) (Douglas, Black, J.J., concurring).

[24]Subsection (d)(3) of § 6013 imposes joint and several liability for the tax computed on a married couple filing jointly.

entirely a voluntary matter. Therefore, as distinguished from Wisconsin, the federal government has not attempted to make income that which is not in fact the taxpayer's income merely by calling it such.[25]

VI.

Plaintiffs' second ground of attack on the tax rate schedules is that the due process clause forbids gender-based tax rate differentiation that results in a greater burden on married working females than is imposed upon married male workers. The thrust of plaintiffs' argument in this regard is that generally a "working wife" is the second earner in the family, and, thus, if the couple files a joint return, her husband's marginal tax rate becomes her minimum tax rate. Accordingly, the income of a "working wife," subject as it is to the higher marginal tax rates of § 1(a) when combined with that of her husband, is effectively less than that generated by the same efforts by a male. Such a result, plaintiffs claim, is forbidden by the Constitution, citing *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975).

Plaintiffs concede that the income tax laws are gender neutral on their face but contend that in application they work to discriminate on the basis of sex. Such sex-based discrimination, they assert, runs afoul of the Fifth Amendment's guarantee of equal protection of the laws.

It is true that the due process clause of the Fifth Amendment is infused with equal protection guarantees. *Bolling v. Sharpe,* 347 U.S. 497 (1954); *Frontiero v. Richardson,*

[25]We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income.

284 U.S. at 215 (citation omitted).

714 U.S. 677 (1973). Accordingly, enactments of Congress have been subjected to similar equal protection analysis as that applied to state statutes by virtue of the Fourteenth Amendment. Among the Federal statutes found to contravene the due process clause are those which classify on the basis of sex. *See e.g., Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, supra.*

This court, however, does not perceive the application of the statutes here in question to be that type of invidious gender-based discrimination which the Court found constitutionally intolerable in cases such as *Frontiero* and *Wiesenfeld.* In fact, Congress in enacting these statutes avoided the very type of assumptions about the economic status of men and women which the Court found impermissible in those cases.

Plaintiffs' argument proceeds on the assumption that the husband is the family's "primary" wage earner and any income which the wife's efforts produce is "secondary." The "married filing jointly" rate schedule, of course, is not based on any such assumption and if selected by the taxpayers treats the income of both spouses as an aggregate sum, and no reference is made as to whose income was "principal" and whose "secondary." Indeed, the Court in *Frontiero* expressly held that Congress could not assume that a wife's income was supplemental to that of her husband and legislate on that basis. Yet, here, plaintiffs assert that Congress' very failure to recognize that a wife's income is the "second" income of the family and if included with her husband's on a joint return is taxed at a higher rate amounts in some way to gender-based discrimination. This argument is unacceptable.

Moreover, in those cases in which the Supreme Court has found statutes to contravene the due process clause because of gender-based classification, the discriminatory aspects of the statute burdened all affected members of one sex. Thus, in *Frontiero all* service women had to

establish their husband's dependency before they could qualify for the additional benefits made available to all men without any such proof. In *Wiesenfeld,* the Social Security Act was found to discriminate against *all* women who left surviving husbands with dependent children. In *Reed v. Reed,* 404 U.S. 71 (1971), *all* women suffered in a like manner from Idaho's statutory presumptions that males were more qualified to administer decedent's estates. In contrast to those cases, the federal tax schedules at issue here cannot be said to burden all women, if indeed any are so burdened.

Plaintiffs' position that working women who file joint returns with their husbands are taxed at a greater rate than men is based on a sort of chronological priority in the incomes of all married persons. Their argument presumes that the husband is the first to enter the labor market, later to be followed by his wife. It is in those instances in which the wife's salary is added to her husband's that the alleged discriminatory effect takes place.

However, plaintiffs ignore those situations where the wife is the first to enter the work force or where the spouses are both employed when married. In neither of those events can the wife's income be considered the "second" in time to that of her husband and thus be taxed at a higher rate. Indeed, in the former instance it is the male who might allege with equal persuasion that his work efforts produce less economic benefit for his family than those of a married woman whose income, to accept plaintiffs' characterization, was "first" in time. In sum, the court finds no basis for holding that the statutes here under attack invidiously discriminate on the basis of sex.

VII.

Another prong of plaintiffs' due process argument is that the tax rate structure impermissibly infringes upon certain fundamental rights. They contend that by

imposing a greater total tax on the combined income of a married couple, each of whom has "significant" income, than would be imposed on their separate incomes were they single, the statute penalizes them for exercising their fundamental right of marriage and interferes with their fundamental rights of privacy and association. Thus, they term the additional tax a "marriage penalty."

The Government counters that the statutes here in issue do not intrude upon any fundamental personal rights of plaintiffs by impeding their right to marry or denying their rights to privacy or free association. The Government also questions whether the right to marry is itself a fundamental right. *See Davis v. Meek,* 344 F. Supp. 298, 299-301 (N.D. Ohio 1972); *contra, Holt v. Shelton,* 341 F. Supp. 821 (M.D. Tenn. 1972); *O'Neill v. Dent,* 364 F. Supp. 565 (E.D.N.Y. 1973).

A.

Plaintiffs' assertion that marriage is a "fundamental right," as that term is used for due process or equal protection analysis, finds considerable support in the opinions of the Supreme Court. As early as 1923, the Court in *Meyer v. Nebraska,* 262 U.S. 390 (1923), recognized the central position that marriage holds in our society. In *Skinner v. Oklahoma,* 316 U.S. 535 (1942), the court again commented upon the importance of marriage in striking down an Oklahoma statute which provided for sterilization of certain "habitual criminals." Writing for the Court, Mr. Justice Douglas noted

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. 316 U.S. at 541.

This theme continued in *Griswold v. Connecticut,* 381 U.S. 479 (1965), wherein the Court struck down Connecticut's criminal restrictions on the access of married

persons to contraceptives. The Court found that a "penumbra" emanating from rights expressly recognized in the Bill of Rights created a "zone of privacy" embracing the marital bedroom. In 1967, Chief Justice Warren, writing for a unanimous Court, struck down Virginia's anti-miscegenation statute as violating the due process and equal protection clauses of the Fourteenth Amendment, holding that

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. 388 U.S. at 12.

Later, in *Boddie v. Connecticut,* 401 U.S. 371 (1971), in the context of a constitutional challenge to a Connecticut statute requiring the payment of a filing fee in order to bring an action for divorce, Mr. Justice Harlan wrote:

> As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. See, *e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923). 401 U.S. at 376.

More recently in *Kras v. United States,* 409 U.S. 434 (1973), the Court by Mr. Justice Blackmun commented on its decision in *Boddie*:

> The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. 409 U.S. at 444 (citations omitted). *See also Eisenstadt v. Baird,* 405 U.S. 438 (1971).

Although the language in these cases clearly supports the proposition that marriage is fundamental in nature, two distinctions are noteworthy. First, no case brought to the attention of this court has flatly stated that marriage is a fundamental right in the context of a constitutional challenge to the Internal Revenue Code. Second, the statutes involved in the Supreme Court cases cited above effectively *prohibited* individuals either from making a decision as to marital status, from selecting the marital mate of his or her choice, or from making a highly personal decision under the unbrella of marital privacy. Plaintiffs here do not specifically allege that the Code provisions they attack have *prohibited* them from making these choices. Taken together, these distinctions suggest that while marriage may be a fundamental right, a close examination of the circumstances should precede any legal conclusions drawn from the existence of that right.[26]

In particular, this court must take notice of the fact that the federal government traditionally has had very broad classification powers in the taxation field. In testing both state and federal taxing statutes, the Supreme Court generally has accorded classifications a presumption that the categorization is reasonable and constitutional and has upheld a tax classification if any state of facts rationally justifying it is demonstrated to or perceived by

[26]Plaintiffs allege that the penalties exacted from them infringe upon their "fundamental right *to* marry" (emphasis added). It might appear that there is a standing question present since plaintiffs are already married. They do not allege that the extra taxes they have paid have in effect abrogated their right to marry by bringing them to the brink of divorce. Thus, it might be argued that the plaintiffs lack standing to assert the right. However, the right is not limited to the act of becoming married, but encompasses the entire marriage relationship. *See* Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972). Whether denominated the "right to marry," the "right of marriage," or the "right to stay married," plaintiffs have standing to attack a provision which may affect that relationship adversely.

a court. *United States v. Md. Savings-Share Ins. Corp.*, 400 U.S. 4 (1970). In addition, the Supreme Court consistently has acknowledged its lack of expertise in the complex arena of taxation. *See, e.g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42 (1973). On the other hand, the Court has traditionally employed the strict scrutiny standard when a fundamental right is at stake. If a statute is found to burden a fundamental right, the Court has required that the statute be justified by a showing that it is necessary to promote a compelling governmental interest, *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Roe v. Wade,* 410 U.S. 113 (1973), and that there be "no reasonable [way] to achieve these goals with a lesser burden on constitutionally protected activity." *Dunn v. Blumstein,* 405 U.S. 330, 343 (1972). The burden of demonstrating that no less burdensome means exist has traditionally been placed on the government.

This court recognizes the fundamental nature of marriage and the freedom to marry under the Constitution and is cognizant of the requirement that a governmental regulation or statute which burdens or impinges upon the exercise of those rights must be subjected to strict judicial scrutiny. However, this court is also mindful of the deference to be accorded the legislative branch in the exercise of its taxing power and the fact that "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42 (1973). The doctrine of judicial deference cannot be completely disregarded even in the face of a right as fundamental as that of marriage. Accordingly, the level of scrutiny to which this court will subject the statutory provisions in question must take into account not only the importance attached to the right of marriage but also the inherently complex nature of legislative decisions in the field of taxation.

B.

Given the fundamental nature of the right alleged to be infringed or burdened, the court must inquire whether in fact the classification scheme infringes upon or burdens the exercise of the constitutionally protected rights of these plaintiffs.

At the outset, it should be emphasized that the tax rate schedules do not in all instances disadvantage those who are married. In those cases where only one spouse has income or where the income of only one marital partner is "significant," to borrow plaintiffs' phrase, the tax structure continues to favor those who marry. It is only when each spouse has "significant" income that the alleged "marriage penalty" results.

Nevertheless, it appears that there are substantial numbers of married couples whose distribution of income within the marital unit subjects them to greater taxes than would be the case if they were single.[27] Plaintiffs fit into this category. The Barters have paid $160.50 more on their 1971 income by filing a joint return that if each could have filed a separate return using the rate schedule for single persons under § 1(c). Similarly, the Blairs paid $479.58 more on their 1971 taxable income than they would have by filing separate returns using the § 1(c) rates.

While there is no question that the Barters and Blairs have paid more than they would have paid were they not married, this is not dispositive of the issue of whether these amounts are a constitutionally significant burden

[27]Charts presented to the House Ways and Means Committee for the year 1969 showed that in 28.8% of those "two-earner" couples, the income of the second spouse accounted for 21% or more of the couple's aggregate income. It is at this level and above that the "marriage penalty" occurs. *See* Hearings before the Ways and Means Committee of the House on Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working, 92d Cong., 2d Sess., p. 81 (1972). [Hereinafter referred to as Hearings.]

on their right of marriage in the context of this attack on the Internal Revenue Code.[28] In cases involving other fundamental rights, but not involving attacks on the Internal Revenue Code, the Supreme Court has interpreted broadly the concept of a burden. In particular, in holding durational residency requirements for voting and for welfare unconstitutional as an abridgment of the fundamental right to travel, the Court dismissed contentions that the requirements must actually seek to or actually deter such travel before they may be deemed unconstitutional. Instead, the Court found it sufficient that the requirements *penalized* the exercise of the right. *Dunn v. Blumstein*, 405 U.S. 330, 339-41 (1972). Such reasoning is not directly applicable here. Whatever legal label may be attached to taxes, in practical effect all taxes are a form of penalty. While the additional taxes paid by the plaintiffs here may constitute a penalty, the mere lack of mathematical precision in the application of a taxing scheme to all citizens, married and single, does not render it constitutionally infirm. When the Founding Fathers gave the federal government the power to tax, they were certainly aware that the imposition of taxes would affect multifarious activities and that even when structured in the most nondiscriminatory manner possible, taxes would still lack mathematical precision in their application to some citizens in certain circumstances. Hence, to conclude that the taxes in dispute here "penalize" some married persons is to do no more than to recognize the true nature of the animal. Not all married persons are adversely affected and there is certainly no evidence that Congress intended to burden or deter marriages of two-income couples. A further inquiry into the nature and extent of the burden on these taxpayers is necessary in order to determine whether, in the context of the legislative branch's power to tax, a constitutionally significant burden on these taxpayers' right to marriage exists.

[28]*Cf.* note 26, *supra*.

The Government argues that the tax schedules do not burden or infringe upon the right of marriage of these taxpayers but merely recognize that two married persons living together have a greater ability to pay taxes than do two single individuals, each of whom maintains his or her own household. By sharing living accommodations, it is argued, two married persons achieve certain economies in household expenses, *e.g.*, rent, utilities, etc., over two single persons each of whom maintain separate residences.

Of course, the problem with this justification for the differentiation in the tax treatment afforded these married persons is that it does suffer from imprecision. The Government's own statistics demonstrate the inexactitude of the classification scheme. In testimony before the House Ways and Means Committee, Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, indicated that approximately 50% of those persons filing single returns did not maintain their own households but rather lived with either parents or children. Of the remaining 50% of persons filing single returns — that is, those not living with parents or children — he estimated that about three-quarters, or 37.5% of the total, actually maintained their own households.[29] Thus, approximately 62.5% of persons filing single returns did not maintain separate households and thus apparently had the same ability to pay taxes as two married persons. Yet, the tax rate schedules impose on certain married persons a greater tax burden on the sole basis that they are married. In particular, the Barters and the Blairs have paid more taxes than single persons with the same ability to pay.

The court is aware that practical barriers may exist which would prevent the IRS from taking into account economies of scale enjoyed by unmarried persons. Also, the actual effect on plaintiffs' marriages of the additional

[29] *Hearings, supra*, note 27, at 76-77.

taxes they paid is not clear. Nevertheless, the court may assume that the additional taxes paid do constitute a constitutionally significant burden since the court concludes that the Government has a compelling interest which justified such a burden.

C.

Even if the application of a statutory scheme burdens the exercise of a constitutional right, that does not lead inexorably to a conclusion that the scheme is unconstitutional. Even constitutionally protected rights must give way to laws which are necessary to promote a compelling governmental interest. However, the Government normally bears a heavy burden not only of demonstrating that a compelling interest is served but also that there exists no other reasonable means of serving that interest which imposes a lesser burden on the constitutionally protected activity. *Dunn v. Blumstein, supra,* 405 U.S. at 342-43.

In this regard, it is apparent that the purpose of § 803 of the 1969 Tax Reform Act was to alleviate the tax burden which single taxpayers bore under the previous tax laws. The legislative history demonstrates that Congress was concerned about the imbalance in tax burdens which existed between married and single taxpayers and was determined to afford single taxpayers relief.

It cannot be gainsaid that equalization of taxes among persons with equal ability to pay is a legitimate legislative goal. More particularly, in the context of the past history of the tax treatment of single individuals, Congress acted well within the bounds of its authority in reducing their taxes. At the same time, Congress reaffirmed the longstanding policy that married couples with equal aggregate incomes should pay equal taxes regardless of differences in the contributions of each spouse to the aggregate. The marriage unit has been recognized as a legitimate taxable entity since the

original enactment of the joint return provisions in 1948. Equal treatment of such entities is certainly a legitimate legislative objective. As at least one scholar has noted, however, the inevitable result of simultaneously reducing the differential between single and married taxpayers, maintaining the progressive rate structures, and adhering to the policy of equal taxes for all equal income married couples was the imposition of a "marriage penalty" on some two-job married couples.[30] Not all married couples were adversely affected. Indeed, some single taxpayers remain subject to a "singles penalty." Such taxpayers would find their taxes reduced, not increased, if they were to marry. Given the inevitability of this result and the legitimate legislative goals of reducing the differential between single and married taxpayers and of maintaining equal taxes for equal income married couples, it is obvious that the Government has a compelling interest to justify this legislation.

Moreover, it is unclear that "less drastic means" existed which would have achieved these same legislative goals. Plaintiffs, in their brief submitted with pending motions for summary judgment, offer several suggestions of allegedly less drastic means to achieve the purposes involved here.[31] In fact, however, some of these proposals abrogate the principle of equal taxation of equal income married couples and create other substantial difficulties as well. For example, plaintiffs suggest that married taxpayers be allowed to file separate returns using the single rates when they might find it advantageous to do so. Given a progressive rate of taxation, such a system would impose higher taxes on a "one-earner" married couple than on a married couple with the same aggregate income but where both spouses

[30] *See* Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1391, 1395-96, 1429-30 (1975).

[31] Brief for the Plaintiffs (1) In Opposition to Defendant's First and Third Defenses and (2) In Support of Plaintiffs' Motion for Summary Judgment at 65-66.

work. The Government also contends that the prohibition against married persons filing separate returns using single rates is necessary to prevent married persons filing separate returns from "arranging their affairs" so as to avoid or lower their taxes. Presumably by this the Government means that without the prohibition, a married person would attempt to shift income or deductions to his or her spouse and thus lower the couple's total tax.

Aside from any particular proposal, this court finds itself ill-equipped to judge the merit of plaintiffs' suggestions or of the many others which might be offered. The plaintiffs' proposals are presented in only the barest outline. Lurking beneath these proposals are complexities of the highest order. The proposals may in fact infringe upon other fundamental rights. The process of evaluating specific tax proposals and of weighing their relative discriminatory impacts is primarily a legislative, not a judicial, function.

Absent the complexities of the Internal Revenue Code, the Government would normally bear the burden of demonstrating that no less burdensome means exist which would satisfy its interests. Theoretically, a better answer than the present tax structure may exist — one which either does not burden the plaintiffs or which burdens them to a lesser extent. But the tax system is an "arena in which no perfect alternatives exist." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 42(1973). Given this fact, this court cannot require the Government to demonstrate more convincingly than it has that no less burdensome means exist. To do so would be effectively to abrogate the constitutional taxing power of Congress. *Cf. Brushaber v. Union P.R. Co.*, 240 U.S. 1(1976). Consequently, plaintiffs' argument that the

tax rate structure impermissibly infringes on their fundamental right to marry must fail.[32]

Plaintiffs also raise other due process objections to the tax rate differentials imposed on them as married persons. They argue that there is no rational reason to justify the higher tax rates applicable to a married person whose spouse has significant separate income. Alternatively, they argue that there is no fair and substantial relation between the higher tax rates imposed on them and the legitimate objectives of the Tax Reform Act of 1969. They cite *Moritz v. Comm'r,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973), for the proposition that the "fair and substantial relation" standard should be applied. It is unnecessary to treat these arguments extensively since the judicial standards urged here are less strict than the one applied under plaintiffs' fundamental right argument. Since plaintiffs' fundamental right argument has failed, these more general due process arguments must fall with them. Aside from the assertion of a fundamental right, the classifications challenged here do not differ significantly from the challenges single taxpayers raised against the rate structure existing prior to the Tax Reform Act of 1969. Courts unanimously upheld that tax rate disadvantage to single taxpayers on the ground that classification by marital status was reasonable. *Kellems v. Comm'r,* 58 T.C. 556 (1972), *aff'd per curiam,* 474 F.2d 1399 (2d Cir. 1973), *cert. denied,* 414 U.S. 831 (1973); *Faraco v. Comm'r,* 261 F.2d 387 (4th Cir. 1958); *Shinder v. Comm'r,* 395 F.2d 222 (9th Cir. 1968).

[32]Plaintiffs have also alleged that the statute interferes with their fundamental rights of privacy and association. Without pausing to address the nature of these rights or whether the statute infringes them, the court merely notes that these allegations, if true, must fail for substantially the same reasons that the fundamental right of marriage claim fails.

VIII.

Finally, the plaintiffs contend that the statutes as applied to them impermissibly infringe on their rights to freely exercise their religious beliefs as to marriage. The court finds no impermissible restriction on those rights by the statutes under attack here.

Plaintiffs contend that they hold sincere religious beliefs concerning marriage and that they are required to pay more taxes solely because they are married. They argue that they are forced to choose between maintaining their marriages and paying higher taxes on the one hand and terminating their marriages and paying lower taxes on the other.

The court does not question the sincerity of plaintiffs beliefs nor their right to practice those beliefs. The provisions of the Internal Revenue Code under attack, however, were not enacted with a design to interfere with plaintiffs' free exercise of their religion. Rather, they were enacted to advance valid, secular government purposes. The free exercise clause of the First Amendment bars "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner,* 374 U.S. 398, 402 (1963). Plaintiffs do not contend that these statutes constitute a direct tax on all marriages. The fact that some married persons may pay more taxes due to their peculiar economic circumstances does not render a general taxing statute a regulation of religious beliefs. The Constitution does not prevent Congress from levying an income tax on all people, regardless of religion, for support of the general government merely because the income tax may have an incidental effect on the religious practices of certain persons. *Cf. Johnson v. Robinson,* 415 U.S. 361, 385 (1974); *Autenreith v. Cullen,* 418 F.2d 586 (9th Cir.), *cert. denied,* 397 U.S. 1036 (1969); *United States v. Keig,* 334 F.2d 823 (7th Cir. 1964).

Even if the court agreed that the Code provisions under

attack burden plaintiffs' free exercise of their religion, the Government has a sufficiently substantial interest in raising revenue and in equalizing the tax burden between single and married taxpayers to justify any incidental burden on the plaintiffs. *Cf. Gillette v. United States*, 401 U.S. 437 (1971); *Braunfeld v. Brown*, 366 U.S. 599 (1961). The same reasoning that required rejection of plaintiffs' "fundamental right" claim also defeats their free exercise clause claim here. Consequently, the plaintiffs' free exercise clause claim must fail.

ORDER

Accordingly, the defendent's motion for summary judgment is granted in William G. Barter, et ux. v. United States of America, Civil No. F 74-112, and Ralph D. Blair, et ux. v. United States of America, Civil No. F 74-113, but is denied in Sarah G. Johnson v. United States of America, Civil No. F 74-111. The plaintiffs' motion for summary judgment is denied in all three cases.

The clerk shall enter final judgment on a separate document in causes F 74-112 and F 74-113 in favor of the defendant and against the plaintiffs, and the judgments so entered in these two cases shall constitute a final judgment in each pursuant to Rule 54(b), Fed. R. Civ. P., this court having determined that there is no just reason for delay.

Entered this 8th day of November, 1976.

s/ Jesse E. Eschbach
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1101

WILLIAM G. BARTER, WANDA B. BARTER, RALPH D. BLAIR and PAULINE D. BLAIR,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
Nos. F 74-112 & F 74-113—**Jesse E. Eschbach**, *Judge.*

ARGUED APRIL 25, 1977—DECIDED MAY 31, 1977

Before CUMMINGS and PELL, *Circuit Judges*, and GORDON, *District Judge.**

PER CURIAM. This appeal involves taxpayer refund suits, consolidated in the district court and here, initiated by two married couples. The taxpayers feelingly and forcefully assert that the rate schedules of the Internal Revenue Code, 26 U.S.C. § 1, violate the due process clause of the Fifth Amendment, the free exercise clause

* The Honorable Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

of the First Amendment, and the right to associate in marriage protected by the First, Fourth, Fifth, Ninth, and Tenth Amendments to the Constitution, in that higher tax rates are imposed on the taxable income of a married person whose spouse has significant income[1] than on the same taxable income of an unmarried person.

The district court determined that this so-called "marriage penalty" does not offend the Constitution. *Johnson v. United States*, 422 F.Supp. 958 (N.D. Ind. 1976). The plaintiffs' motion for summary judgment was therefore denied, and the summary judgment motion of the United States was granted. Final judgments in favor of the United States were entered pursuant to Rule 54(b), Fed. R. Civ. P., the district court retaining on its docket for further proceedings the refund suit of Sarah G. Johnson, No. F 74-111 below, which had earlier been consolidated with appellants' suits.

We agree with the district court that the inequities asserted to inhere in the "marriage penalty," whatever may be their persuasiveness as arguments for legislative change,[2] do not rise to the level of constitutional violations of appellants' rights. The district court's thoughtful and workmanlike opinion cogently expounds the reasons for this conclusion, and there is little to be added to its analysis except to observe that it has not been demonstrated to us that perfect equality or absolute logical consistency between persons subject to the Internal Revenue Code has been, at least since the adoption of the Sixteenth Amendment, a constitutional *sine qua non*. Accordingly, the opinion of the district court is,

[1] Significant income in this context means a contribution to the married couple's income of, generally, at least 20% of the couple's total income.

[2] Although it does not, of course, affect the result in this case, we take notice of the fact that such arguments have recently been made to and acted upon by the Congress. The pertinent tax bill has very recently been signed into law by the President, and is said to contain provisions embodying "an effort to reduce the 'marriage penalty.'" Chicago Daily News, May 17, 1977, at 4, col. 3.

with certain exceptions,[3] adopted as the opinion of this court, and the judgments appealed from are affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] As noted, a third consolidated case was dealt with in the district court's opinion; that case is not before us. Thus those portions of the district court's opinion addressing that case are not adopted, nor are any views with reference thereto implied. Also, appellants advanced in the district court the theory that the "marriage penalty" constituted unconstitutional sex discrimination, which theory has been abandoned on appeal. Accordingly, part VI of the district court's opinion, which considers and rejects that theory, is not adopted nor are any views of this court pertinent thereto to be inferred.

United States Court of Appeals

For the Seventh Court
Chicago, Illinois 60604

July 11, 1977

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. Myron L. Gordon,*District Judge**

No. 77-1101

WILLIAM G. BARTER, WANDA B. BARTER, RALPH D. BLAIR and PAULINE D. BLAIR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
Nos. F 74-112 & 74-113 — **Jesse E. Eschbach,** *Judge.*

On consideration of the petition for rehearing, and suggestion for rehearing *en banc* filed in the above-entitled cause by the plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Honorable Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

"SECTION 1. TAX IMPOSED.

"(a) MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES.—There is hereby imposed on the taxable income of—

"(1) every married individual (as defined in section 143) who makes a single return jointly with his spouse under section 6013, and

"(2) every surviving spouse (as defined in section 2(a)),

A tax determined in accordance with the following table:

"If the taxable income is:	The tax is:
Not over $1,000	14% of the taxable income.
Over $1,000 but not over $2,000	$140, plus 15% of excess over $1,000.
Over $2,000 but not over $3,000	$290, plus 16% of excess over $2,000.
Over $3,000 but not over $4,000	$450, plus 17% of excess over $3,000.
Over $4,000 but not over $8,000	$620, plus 19% of excess over $4,000.
Over $8,000 but not over $12,000	$1,380, plus 22% of excess over $8,000.
Over $12,000 but not over $16,000	$2,260, plus 25% of excess over $12,000.
Over $16,000 but not over $20,000	$3,260, plus 28% of excess over $16,000.
Over $20,000 but not over $24,000	$4,380, plus 32% of excess over $20,000.
Over $24,000 but not over $28,000	$5,660, plus 36% of excess over $24,000.
Over $28,000 but not over $32,000	$7,100, plus 39% of excess over $28,000.
Over $32,000 but not over $36,000	$8,660, plus 42% of excess over $32,000.
Over $36,000 but not over $40,000	$10,340, plus 45% of excess over $36,000.
Over $40,000 but not over $44,000	$12,140, plus 48% of excess over $40,000.
Over $44,000 but not over $52,000	$14,060, plus 50% of excess over $44,000.
Over $52,000 but not over $64,000	$18,060, plus 53% of excess over $52,000.
Over $64,000 but not over $76,000	$24,420, plus 55% of excess over $64,000.
Over $76,000 but not over $88,000	$31,020, plus 58% of excess over $76,000.
Over $88,000 but not over $100,000	$37,980, plus 60% of excess over $88,000.
Over $100,000 but not over $120,000	$45,180, plus 62% of excess over $100,000.
Over $120,000 but not over $140,000	$57,580, plus 64% of excess over $120,000.
Over $140,000 but not over $160,000	$70,380, plus 66% of excess over $140,000.
Over $160,000 but not over $180,000	$83,580, plus 68% of excess over $160,000.
Over $180,000 but not over $200,000	$97,180, plus 69% of excess over $180,000.
Over $200,000	$110,980, plus 70% of excess over $200,000.

"(b) HEADS OF HOUSEHOLDS.—There is hereby imposed on the taxable income of every individual who is the head of a household (as defined in section 2(b)) a tax determined in accordance with the following table:

"If the taxable income is:	The tax is:
Not over $1,000	14% of the taxable income.
Over $1,000 but not over $2,000	$140, plus 16% of excess over $1,000.
Over $2,000 but not over $4,000	$300, plus 18% of excess over $2,000.
Over $4,000 but not over $6,000	$660, plus 19% of excess over $4,000.
Over $6,000 but not over $8,000	$1,040, plus 22% of excess over $6,000.
Over $8,000 but not over $10,000	$1,480, plus 23% of excess over $8,000.
Over $10,000 but not over $12,000	$1,940, plus 25% of excess over $10,000.
Over $12,000 but not over $14,000	$2,440, plus 27% of excess over $12,000.
Over $14,000 but not over $16,000	$2,980, plus 28% of excess over $14,000.
Over $16,000 but not over $18,000	$3,540, plus 31% of excess over $16,000.
Over $18,000 but not over $20,000	$4,160, plus 32% of excess over $18,000.
Over $20,000 but not over $22,000	$4,800, plus 35% of excess over $20,000.
Over $22,000 but not over $24,000	$5,500, plus 36% of excess over $22,000.
Over $24,000 but not over $26,000	$6,220, plus 38% of excess over $24,000.
Over $26,000 but not over $28,000	$6,980, plus 41% of excess over $26,000.
Over $28,000 but not over $32,000	$7,800, plus 42% of excess over $28,000.
Over $32,000 but not over $36,000	$9,480, plus 45% of excess over $32,000.
Over $36,000 but not over $38,000	$11,280, plus 48% of excess over $36,000.
Over $38,000 but not over $40,000	$12,240, plus 51% of excess over $38,000.
Over $40,000 but not over $44,000	$13,260, plus 52% of excess over $40,000.
Over $44,000 but not over $50,000	$15,340, plus 55% of excess over $44,000.
Over $50,000 but not over $52,000	$18,640, plus 56% of excess over $50,000.
Over $52,000 but not over $64,000	$19,760, plus 58% of excess over $52,000.
Over $64,000 but not over $70,000	$26,720, plus 59% of excess over $64,000.
Over $70,000 but not over $76,000	$30,260, plus 61% of excess over $70,000.
Over $76,000 but not over $80,000	$33,920, plus 62% of excess over $76,000.
Over $80,000 but not over $88,000	$36,400, plus 63% of excess over $80,000.
Over $88,000 but not over $100,000	$41,440, plus 64% of excess over $88,000.
Over $100,000 but not over $120,000	$49,120, plus 66% of excess over $100,000.
Over $120,000 but not over $140,000	$62,320, plus 67% of excess over $120,000.
Over $140,000 but not over $160,000	$75,720, plus 68% of excess over $140,000.
Over $160,000 but not over $180,000	$89,320, plus 69% of excess over $160,000.
Over $180,000	$103,120, plus 70% of excess over $180,000.

"(c) UNMARRIED INDIVIDUALS (OTHER THAN SURVIVING SPOUSES AND HEADS OF HOUSEHOLDS).—There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as defined in section 143) a tax determined in accordance with the following table:

"If the taxable income is:	The tax is:
Not over $500	14% of the taxable income.
Over $500 but not over $1,000	$70, plus 15% of excess over $500.
Over $1,000 but not over $1,500	$145, plus 16% of excess over $1,000.
Over $1,500 but not over $2,000	$225, plus 17% of excess over $1,500.
Over $2,000 but not over $4,000	$310, plus 19% of excess over $2,000.
Over $4,000 but not over $6,000	$690, plus 21% of excess over $4,000.
Over $6,000 but not over $8,000	$1,110, plus 24% of excess over $6,000.
Over $8,000 but not over $10,000	$1,590, plus 25% of excess over $8,000.
Over $10,000 but not over $12,000	$2,090, plus 27% of excess over $10,000.
Over $12,000 but not over $14,000	$2,630, plus 29% of excess over $12,000.
Over $14,000 but not over $16,000	$3,210, plus 31% of excess over $14,000.
Over $16,000 but not over $18,000	$3,830, plus 34% of excess over $16,000.
Over $18,000 but not over $20,000	$4,510, plus 36% of excess over $18,000.
Over $20,000 but not over $22,000	$5,230, plus 38% of excess over $20,000.
Over $22,000 but not over $26,000	$5,990, plus 40% of excess over $22,000.
Over $26,000 but not over $32,000	$7,590, plus 45% of excess over $26,000.
Over $32,000 but not over $38,000	$10,290, plus 50% of excess over $32,000.
Over $38,000 but not over $44,000	$13,290, plus 55% of excess over $38,000.
Over $44,000 but not over $50,000	$16,590, plus 60% of excess over $44,000.
Over $50,000 but not over $60,000	$20,190, plus 62% of excess over $50,000.
Over $60,000 but not over $70,000	$26,390, plus 64% of excess over $60,000.
Over $70,000 but not over $80,000	$32,790, plus 66% of excess over $70,000.
Over $80,000 but not over $90,000	$39,390, plus 68% of excess over $80,000.
Over $90,000 but not over $100,000	$46,190, plus 69% of excess over $90,000.
Over $100,000	$53,090, plus 70% of excess over $100,000.

"(d) MARRIED INDIVIDUALS FILING SEPARATE RETURNS; ESTATES AND TRUSTS.—There is hereby imposed on the taxable income of every married individual (as defined in section 143) who does not make a single return jointly with his spouse under section 6013, and of every estate and trust taxable under this subsection, a tax determined in accordance with the following table:

"If the taxable income is:	The tax is:
Not over $500	14% of the taxable income.
Over $500 but not over $1,000	$70, plus 15% of excess over $500.
Over $1,000 but not over $1,500	$145, plus 16% of excess over $1,000.
Over $1,500 but not over $2,000	$225, plus 17% of excess over $1,500.
Over $2,000 but not over $4,000	$310, plus 19% of excess over $2,000.

"If the taxable income is:

	The tax is:
Over $1,000 but not over $8,000----	$690, plus 22% of excess over $4,000.
Over $8,000 but not over $8,000----	$1,130, plus 25% of excess over $6,000.
Over $8,000 but not over $10,000--	$1,630, plus 28% of excess over $8,000.
Over $10,000 but not over $12,000--	$2,190, plus 32% of excess over $10,000.
Over $12,000 but not over $14,000--	$2,830, plus 36% of excess over $12,000.
Over $14,000 but not over $16,000--	$3,550, plus 39% of excess over $14,000.
Over $16,000 but not over $18,000--	$4,330, plus 42% of excess over $16,000.
Over $18,000 but not over $20,000--	$5,170, plus 45% of excess over $18,000.
Over $20,000 but not over $22,000--	$6,070, plus 48% of excess over $20,000.
Over $22,000 but not over $26,000--	$7,030, plus 50% of excess over $22,000.
Over $26,000 but not over $32,000--	$9,030, plus 53% of excess over $26,000.
Over $32,000 but not over $38,000--	$12,210, plus 55% of excess over $32,000.
Over $38,000 but not over $44,000--	$15,510, plus 58% of excess over $38,000.
Over $44,000 but not over $50,000--	$18,990, plus 60% of excess over $44,000.
Over $50,000 but not over $60,000--	$22,590, plus 62% of excess over $50,000.
Over $60,000 but not over $70,000--	$28,790, plus 64% of excess over $60,000.
Over $70,000 but not over $80,000--	$35,190, plus 66% of excess over $70,000.
Over $80,000 but not over $90,000--	$41,790, plus 68% of excess over $80,000.
Over $90,000 but not over $100,000-	$48,590, plus 69% of excess over $90,000.
Over $100,000----------	$55,490, plus 70% of excess over $100,000."

1971 Tax Rate Schedules

If you do not use one of the Tax Tables, figure your tax on the amount on Form 1040, line 50, by using the appropriate Tax Rate Schedule on this page. Enter tax on Form 1040, line 19.

SCHEDULE X—Single Taxpayers Not Qualifying for Rates in Schedule Y or Z

If the amount on Form 1040, line 50, is: Over—	But not over—	Enter on Form 1040, line 19:	of excess over—
Not over $500 . . .		14% of the amount on line 50.	
$500	$1,000	$70+15%	$500
$1,000	$1,500	$145+16%	$1,000
$1,500	$2,000	$225+17%	$1,500
$2,000	$4,000	$310+19%	$2,000
$4,000	$6,000	$690+21%	$4,000
$6,000	$8,000	$1,110+24%	$6,000
$8,000	$10,000	$1,590+25%	$8,000
$10,000	$12,000	$2,090+27%	$10,000
$12,000	$14,000	$2,630+29%	$12,000
$14,000	$16,000	$3,210+31%	$14,000
$16,000	$18,000	$3,830+34%	$16,000
$18,000	$20,000	$4,510+36%	$18,000
$20,000	$22,000	$5,230+38%	$20,000
$22,000	$26,000	$5,990+40%	$22,000
$26,000	$32,000	$7,590+45%	$26,000
$32,000	$38,000	$10,290+50%	$32,000
$38,000	$44,000	$13,290+55%	$38,000
$44,000	$50,000	$16,590+60%	$44,000
$50,000	$60,000	$20,190+62%	$50,000
$60,000	$70,000	$26,390+64%	$60,000
$70,000	$80,000	$32,790+66%	$70,000
$80,000	$90,000	$39,390+68%	$80,000
$90,000	$100,000	$46,190+69%	$90,000
$100,000		$53,090+70%	$100,000

SCHEDULE Y—Married Taxpayers and Certain Widows and Widowers

If you are a married person living apart from your spouse, see page 4 of the instructions in this package to see if you can be considered to be "unmarried" for purposes of using Schedule X or Z.

Married Taxpayers Filing Joint Returns and Certain Widows and Widowers (See page 4)

If the amount on Form 1040, line 50, is: Over—	But not over—	Enter on Form 1040, line 19:	of excess over—
Not over $1,000 . .		14% of the amount on line 50.	
$1,000	$2,000	$140+15%	$1,000
$2,000	$3,000	$290+16%	$2,000
$3,000	$4,000	$450+17%	$3,000
$4,000	$8,000	$620+19%	$4,000
$8,000	$12,000	$1,380+22%	$8,000
$12,000	$16,000	$2,260+25%	$12,000
$16,000	$20,000	$3,260+28%	$16,000
$20,000	$24,000	$4,380+32%	$20,000
$24,000	$28,000	$5,660+36%	$24,000
$28,000	$32,000	$7,100+39%	$28,000
$32,000	$36,000	$8,660+42%	$32,000
$36,000	$40,000	$10,340+45%	$36,000
$40,000	$44,000	$12,140+48%	$40,000
$44,000	$52,000	$14,060+50%	$44,000
$52,000	$64,000	$18,060+53%	$52,000
$64,000	$76,000	$24,420+55%	$64,000
$76,000	$88,000	$31,020+58%	$76,000
$88,000	$100,000	$37,980+60%	$88,000
$100,000	$120,000	$45,180+62%	$100,000
$120,000	$140,000	$57,580+64%	$120,000
$140,000	$160,000	$70,380+66%	$140,000
$160,000	$180,000	$83,580+68%	$160,000
$180,000	$200,000	$97,180+69%	$180,000
$200,000		$110,980+70%	$200,000

Married Taxpayers Filing Separate Returns

If the amount on Form 1040, line 50, is: Over—	But not over—	Enter on Form 1040, line 19:	of excess over—
Not over $500 . . .		14% of the amount on line 50.	
$500	$1,000	$70+15%	$500
$1,000	$1,500	$145+16%	$1,000
$1,500	$2,000	$225+17%	$1,500
$2,000	$4,000	$310+19%	$2,000
$4,000	$6,000	$690+22%	$4,000
$6,000	$8,000	$1,130+25%	$6,000
$8,000	$10,000	$1,630+28%	$8,000
$10,000	$12,000	$2,190+32%	$10,000
$12,000	$14,000	$2,830+36%	$12,000
$14,000	$16,000	$3,550+39%	$14,000
$16,000	$18,000	$4,330+42%	$16,000
$18,000	$20,000	$5,170+45%	$18,000
$20,000	$22,000	$6,070+48%	$20,000
$22,000	$26,000	$7,030+50%	$22,000
$26,000	$32,000	$9,030+53%	$26,000
$32,000	$38,000	$12,210+55%	$32,000
$38,000	$44,000	$15,510+58%	$38,000
$44,000	$50,000	$18,990+60%	$44,000
$50,000	$60,000	$22,590+62%	$50,000
$60,000	$70,000	$28,790+64%	$60,000
$70,000	$80,000	$35,190+66%	$70,000
$80,000	$90,000	$41,790+68%	$80,000
$90,000	$100,000	$48,590+69%	$90,000
$100,000		$55,490+70%	$100,000

SCHEDULE Z—Unmarried (or legally separated) Taxpayers Who Qualify as Heads of Household (See page 4)

If the amount on Form 1040, line 50, is: Over—	But not over—	Enter on Form 1040, line 19:	of excess over—
Not over $1,000 . .		14% of the amount on line 50.	
$1,000	$2,000	$140+16%	$1,000
$2,000	$4,000	$300+18%	$2,000
$4,000	$6,000	$660+19%	$4,000
$6,000	$8,000	$1,040+22%	$6,000
$8,000	$10,000	$1,480+23%	$8,000
$10,000	$12,000	$1,940+25%	$10,000
$12,000	$14,000	$2,440+27%	$12,000
$14,000	$16,000	$2,980+28%	$14,000
$16,000	$18,000	$3,540+31%	$16,000
$18,000	$20,000	$4,160+32%	$18,000
$20,000	$22,000	$4,800+35%	$20,000
$22,000	$24,000	$5,500+36%	$22,000
$24,000	$26,000	$6,220+38%	$24,000
$26,000	$28,000	$6,980+41%	$26,000
$28,000	$32,000	$7,800+42%	$28,000
$32,000	$36,000	$9,480+45%	$32,000
$36,000	$38,000	$11,280+48%	$36,000
$38,000	$40,000	$12,240+51%	$38,000
$40,000	$44,000	$13,260+52%	$40,000
$44,000	$50,000	$15,340+55%	$44,000
$50,000	$52,000	$18,640+56%	$50,000
$52,000	$64,000	$19,760+58%	$52,000
$64,000	$70,000	$26,720+59%	$64,000
$70,000	$76,000	$30,260+61%	$70,000
$76,000	$80,000	$33,920+62%	$76,000
$80,000	$88,000	$36,400+63%	$80,000
$88,000	$100,000	$41,440+64%	$88,000
$100,000	$120,000	$49,120+66%	$100,000
$120,000	$140,000	$62,320+67%	$120,000
$140,000	$160,000	$75,720+68%	$140,000
$160,000	$180,000	$89,320+69%	$160,000
$180,000		$103,120+70%	$180,000

THE CONSTITUTION OF THE UNITED STATES

Article 1, § 8 (1.) The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

Article 1, § 9. (4). No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 3

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the

land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 9

The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

AMENDMENT 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 16

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

No. 77-490

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM G. BARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-490

WILLIAM G. BARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the constitutionality of the income tax rates imposed upon married individuals on the ground that the taxes that they paid as married persons filing joint returns exceeded the taxes that would have been due if they had been unmarried and filed a return reporting their separate income. In this refund suit petitioners brought in the United States District Court for the Northern District of Indiana, the district court upheld the constitutionality of the difference in tax rates (Pet. App. 29-60). The court of appeals affirmed *per curiam* (Pet. App. 61-63).

1. The income tax is progressive and taxes married couples with equal income equally. Given these two objectives, the disparities between the relative tax burdens of married persons and single persons are inevitable and a

"marriage-neutral" income tax is impossible. In some cases, the tax will appear to penalize single persons; in other cases the tax will appear to penalize married persons. The best that can be attained is a reasonable compromise. See Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working before the House Committee on Ways and Means, 92d Cong., 2d Sess. 78-79 (1972); Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389, 1395-1396 (1975).

The tax rates in Section 1 of the Internal Revenue Code of 1954, as amended (26 U.S.C.) are substantially the result of two major reforms that sought such a compromise. Prior to 1948, only married couples in community property states were entitled to divide their incomes for tax purposes and thereby reduce their total tax liabilities. Compare *Poe* v. *Seaborn*, 282 U.S. 101, with *Lucas* v. *Earl*, 281 U.S. 111. In order to correct the disparity of tax treatment between married couples in community property states and those in common law states, Congress in 1948 permitted income-splitting by means of the joint return. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 21-24 (1948) S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25 (1948). Cf. *Fernandez* v. *Wiener*, 326 U.S. 340.

While the 1948 introduction of income-splitting benefited married persons, it was not accompanied by a reduction in the tax rates of single persons. As a result, the income tax on a single person could thereafter range as much as 40.9 percent higher than the tax on a married couple with the same income. See S. Rep. No. 91-552, 91st Cong., 1st Sess. 260 (1969). Although single persons asserted that the higher rates denied them due process and equal protection of the law, the courts upheld the constitutionality of the statute on the ground that the

objective of providing equal treatment for all married couples was a reasonable legislative purpose. *Faraco* v. *Commissioner*, 261 F. 2d 387 (C.A. 4), certiorari denied, 359 U.S. 925; *Kellems* v. *Commissioner*, 58 T.C. 556, affirmed *per curiam*, 474 F. 2d 1399 (C.A. 2), certiorari denied, 414 U.S. 831.

In 1969, Congress sought to reduce the substantially higher tax burden on single persons. It therefore amended Section 1 of the Code so that a single person will never be required to pay a tax that would exceed by more than 20 percent the tax that a married couple would pay on the same income. See S. Rep. No. 91-552, *supra*, at 260-262; Tax Reform Act of 1969, Section 803, 83 Stat. 678. These new rates ameliorate the disproportionate tax burden on the unmarried. Moreover, under the new rates, the tax on a married couple will exceed the tax on a single person with the same income only when the husband and wife each has a substantial income, a situation affecting only about 20 percent of married couples. House Hearings, *supra*, at 75, 79. In general, therefore, the tax rates still favor married taxpayers.

To be sure, the present tax system still contains some disparities. But given the inherent complexity of the problem, the taxing scheme Congress adopted in 1948 and refined in 1969, while not perfect, nevertheless satisfies the requirements of due process and equal protection. While petitioners object to the fact that, relative to single persons, married persons do not always fare as well, married persons do not have a constitutional right to most favored tax treatment.

2. Contrary to petitioners' argument (Pet. 13), the decision below does not conflict with *Hoeper* v. *Tax Commission*, 284 U.S. 206. In *Hoeper*, the Court held unconstitutional a Wisconsin law requiring a husband to

report as his own the income of his wife over which he had no title or control. Here, however, the Section 1 tax rates that petitioners challenge do not require the attribution of income from one spouse to the other. The joint return for married persons is elective, not required (see Section 6013), and married persons are free to file separately.

While married persons filing separate returns will pay more tax, in the aggregate, than if they filed jointly (see and compare Section 1(a) and (d) of the Code), each spouse still would be paying tax only on his or her separate income. Furthermore, if married persons filing separately could use the tax rates for single persons, or under any conceivable schedule pay less tax than if they filed jointly, then the tax liability of married couples would once again depend, as it did before 1948, on the amount of income attributable to each spouse. In that event, the 1948 principle of imposing the same tax on all equal-income married couples would be abandoned.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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